In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1706

JANICH BROS., INC., a corporation,
Petitioner,

vs.

THE AMERICAN DISTILLING COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent The American Distilling Company in Opposition To Petition for Writ of Certiorari

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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PRELIMINARY STATEMENT

Petitioner would have this Court grant its writ of certiorari to the court of appeals below because, petitioner claims, the court of appeals has improperly engrafted the "injury to competition" requirement of the Robinson-Patman Act upon Section 2 of the Sherman Act, and because the court of appeals unfairly and erroneously reviewed the evidence before the trial court. Petitioner has misconstrued the opinion of the court of appeals as well as applicable authorities and has inaccurately represented the evidence reflected by the record. The petition is without merit.

STATEMENT OF THE CASE

1. The Parties.

a. JANICH BROS., INC.

Since January 1, 1957, and continuing to time of trial, petitioner Janich Bros., Inc. ("Janich"), plaintiff and appellant below, was engaged in the business of processing, bottling and distributing various lines of alcoholic beverages, including gin and vodka. Janich specialized in selling house label distilled spirits (spirits under labels owned by Janich) to retailers having five or less retail outlets. Janich also sold private label spirits (spirits bottled under labels owned by the retailer) to retailers having less than five outlets. Janich's sales efforts were concentrated in the Northern California counties of Monterey, Santa Clara, Santa Cruz, Alameda, San Mateo and San Francisco. Janich made no significant attempt to sell its products in Southern California.

b. THE AMERICAN DISTILLING COMPANY.

Respondent The American Distilling Company ("American"), defendant and appellee below, since the repeal of prohibition and to the time of trial, was engaged in the manufacture, bottling, distribution and sale of alcoholic beverages throughout the United States.

American maintained two distilling plants, one located in Pekin, Illinois, and another located at Union City, California. Prior to 1966, and going back to the time of repeal of prohibition, American had operated its California distilling and bottling plant in Sausalito, California.

American's primary business has been in the manufacture and sale of its national or standard brands. In California, American has also sold its products under private labels. American's prices for its products of identical or substantially identical grade and quality vary from state to state throughout the United States. Such variations in price are determined and dictated by the different competitive and regulatory conditions existing in each of the different states.

2. The Material Facts.

a. JANICH'S CLAIMS.

The gravamen of Janich's claims was that "beginning as early as 1963", American allegedly sold gin and vodka ("white goods") in California below cost and at unreasonably low and discriminatory prices, with the specific intent of destroying competition. Janich claimed that American violated Section 2, Sherman Act (15 U.S.C. § 2) by attempting to monopolize the sale of gin and vodka in California and Section 2a, Clayton Act, as amended by Robinson-Patman, (15 U.S.C. § 13a), by selling gin and vodka at discriminatory prices. Janich claimed to have suffered substantial injury for which it sought millions of dollars in damages.

b. THE RELEVANT MARKET.

Janich claimed the relevant product market to be eighty proof (80°) private label gin and vodka. The relevant customer market was shown to be all retailers of alcoholic beverages in the State of California. Within this market, Janich admitted that it did not experience any loss in accounts, sales volume, or profit as a result of competition with American on sales to retailers having less than ten retail outlets. Janich complained, however, that it had been prevented from selling its eighty proof (80°) gin and vodka to the so-called "chain accounts" (retail accounts having ten (10) or more outlets). The chain accounts, of which

there are many, included Safeway Stores, Incorporated, Long's Stores, Lucky Stores, Thrifty-Mart, Albertsen's, Von's Grocery, Arden Mayfair, Thrifty Drug Stores, Federated Department Stores, Walgreen's and others.

c. COMPETITION WITHIN THE RELEVANT MARKET.

Suppliers of the relevant market were shown to number no less than one (1) distiller, seventeen (17) processors and bottlers, and one hundred eighty-six (186) wholesalers, all of whom were licensed and permitted to sell under California law distilled spirits, including private label gin and vodka, to retailers in California. Of these, at least thirteen (13) licensed wholesalers and processors of distilled spirits were shown to have been actively engaged in selling private label gin and vodka to the chain accounts (as well as to the smaller accounts).

American sold private label gin and vodka to several of the multiple or chain store retail accounts. American's prices were dictated by competition, and the evidence showed that competitors' prices were frequently below those of American throughout the complaint period and before. At *each* of the chain accounts to which American sold private label gin and vodka, one or more other competitors also sold private label gin and vodka at the same competitive price level.

The unrefuted evidence was that competition at the chain account level was extremely "keen". Janich admitted that as a result it simply could not meet the competition of the other processors and wholesalers in selling to these multiple outlet accounts, and it made no more than one call upon one chain account throughout the complaint period in an effort to sell private label gin or vodka.

d. THE ABSENCE OF ANY COMPETENT EVIDENCE OF MARKET POWER WITHIN THE RELEVANT MARKET.

Janich asserts in its petition that during the period from 1960 to 1974 American's position in the California *alcoholic beverage market* substantially increased from approximately 20% in 1960 to 60% in 1972. This statement is irrelevant and misleading. As shown by the charges asserted by Janich as well as by the evidence, *the relevant market was private label eighty proof (80°) gin and vodka* sold to retailers in California. The only evidence *whatsoever* pertaining to any market share enjoyed by the many competitors at the retail market level were monthly tax lists produced by the California State Board of Equalization showing the total excise taxes paid on *all* liquor sold by each of the listed distributors whose sales to retailers exceeded $1,000 per month. This listed the taxes paid on sales of *all alcoholic beverages sold,* namely not only gin and vodka (the so-called "white goods"), but also bourbon, scotch, brandies, liqueurs, and so on (the so-called "brown goods".) By knowing the total amount of tax paid on the volume of distilled spirits sold, one could determine deductively the total amount of gross sales in volume of *all* distilled spirits sold each month by each listed distributor. *However, it was totally impossible to determine, given the state of the record, how many such cases were gin or vodka, or the gross sales revenue derived from such sales, or indeed how many such cases were private label gin or vodka, or the gross sales revenue derived from such private label sales.* In short, Janich failed to produce any evidence at trial showing market power in the relevant market, or anything approaching evidence from which one could reasonably infer market power or market share within the relevant market.

e. THE ABSENCE OF ANY PREDATORY CONDUCT BY AMERICAN.

(1) American's Alleged Two-Tier Pricing System.

Janich asserts that American employed a "two-tier" pricing system and that this was competent evidence of specific intent to monopolize. The evidence plainly showed that American did not maintain a two-tier pricing system. Instead, owing to different regulatory and competitive pricing conditions prevalent in each of the fifty states, each state represented a separate market and prices within each such market were determined by the competitive and (under the Twenty-First Amendment to the United States Constitution) regulatory conditions within that state.

(2) American's Alleged Below-Cost Sales.

Janich asserts American increased its market share by substantial below-cost sales.

The only evidence introduced at trial with respect to American's profits and costs showed that throughout the complaint period from 1963 through 1973, American derived a profit from the sale of each brand of its private label gin and vodka. While American's profit and cost study (which was the only cost study introduced) showed that during the early part of the complaint period American priced half gallons of certain brands, as well as in a few instances pints, at somewhat below *total* cost, the evidence unequivocally showed that as to each *brand,* American sold to each customer a full range of sizes with fifths and quarts being far and away the largest volume sold, and that as to each such *brand* overall American derived a profit each year throughout the period from the sale of private label gin and vodka sold to each account. Moreover, *there was absolutely no evidence which showed or in any way reasonably suggested that American's prices were below its average variable costs for its products sold.*

f. THE LACK OF ANY COMPETITIVE IMPACT UPON PETITIONER.

Janich admitted it did not experience any loss in accounts, sales volume, or profit as a result of any competition with American with respect to its sales to accounts having less than ten outlets. Janich complained that it was blockaded from selling to the chain accounts. Yet, it admitted making only one (1) call upon one such chain account throughout the complaint period and before in an effort to sell the relevant product, and Janich's own independent witness admitted that such a call could not be considered a "genuine effort". Moreover, Janich admitted that it could not sell to the chains because of the competition of all the eleven or more wholesalers and processors selling to the chain, not just that of American. Competition at this level was extremely keen and Janich simply could not compete.

g. DISPOSITION OF JANICH'S CLAIMS.

After the close of Janich's case, the trial court directed a verdict dismissing Janich's attempt to monopolize claim under Section 2 of the Sherman Act. The trial court did so on the express ground that Janich had failed to produce sufficient evidence from which the jury could reasonably infer that American possessed *specific intent to* monopolize any part of the relevant market, and, in addition, had failed to produce sufficient evidence showing dangerous probability of success of any attempt to monopolize. Janich's Robinson-Patman Act claim was submitted to the jury. It returned a verdict in favor of American, answering the following special interrogatory in the negative:

> "May the *reasonably possible* effect of such different priced sales of gin and vodka have been substantially to lessen competition *or tend to create a monopoly in the sale of distilled spirits to retailer licensees in California* or to injure, destroy or prevent competition with the defendant?" (Emphasis added.)

Janich appealed from the judgment rendered on these separate verdicts to the United States Court of Appeals for the Ninth Circuit. The opinion of the court of appeals affirming the judgment below was issued on December 14, 1977. Janich petitioned for rehearing and suggested a rehearing *en banc*. On March 1, 1978, the Court of Appeals issued its denial of rehearing, stating that the full court had been advised of the suggestion for rehearing *en banc* and that no judge of the court had requested a vote on the suggestion for rehearing *en banc*. The petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected.

WHY THE PETITION SHOULD NOT BE GRANTED

1. The Petition Does Not Present Any Issue Which Should or Need Be Decided by This Court.

Petitioner claims that the court of appeals below has improperly "engrafted" a Robinson-Patman requirement upon Section 2 of the Sherman Act. Petitioner has improperly read the opinion of the court of appeals.

The question presented to the court of appeals was whether petitioner had produced sufficient evidence of predatory conduct from which a reasonable jury could have found that American possessed the *specific intent* to control prices or destroy competition with respect to a part of commerce. Petitioner argued that evidence American had sold its products at different prices in different states was sufficient evidence of such predatory conduct. The court rejected this contention. In doing so, it acted in full accord with prior decisions of this Court and of other courts of appeal.

It has long been held that a price difference, while constituting price "discrimination" within the meaning of the

Robinson-Patman Act, is not *per se* unlawful or predatory. (E.g., *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. 1961).) Unless the unlawful effect proscribed by the Robinson-Patman Act can be shown, geographic price differentiation is not unlawful. (*Id.*) In *FTC v. Anheuser-Busch, Inc., supra*, this Court stated:

> "We are convinced that, whatever may be said with respect to the rest of §§ 2(a) and (b) [Clayton Act]—and we say nothing here—*there are no overtones of business buccaneering in the § 2(a) phrase 'discrimination in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference.*" (Emphasis added.) (363 U.S. 548 at 549.)

A price difference alone cannot provide a justifiable basis for rationally inferring that a business which prices its products at different levels for different geographic locations throughout the United States is engaged perforce in predatory conduct from which one may justifiably infer specific intent to monopolize. Moreover, petitioner is unable to point to any authority whatsoever in support of such a proposition. The decision of the court below is fully consistent with other decisions of long standing and presents no justification for granting the petition.

Petitioner also contends that the court of appeals acted improperly in declaring that a claim for attempt to monopolize must be supported by substantial evidence of dangerous probability of success. Petitioner complains such declaration is in conflict with prior decisions of the Court of Appeals for the Ninth Circuit. Petitioner has incorrectly construed the prior decisions of the Court of Appeals for the Ninth Circuit. Indeed, it is significant that not one judge of the court of appeals requested that a vote be

taken in response to petitioner's suggestion that the court of appeals grant a rehearing *en banc.*

Without question there has for some time been discussion concerning the extent to which "dangerous probability of success" remains a requisite element for attempt to monopolize within the jurisdiction of the Court of Appeals for the Ninth Circuit. (*See, Hallmark Industries v. Reynolds Metals Co.,* 489 F.2d 8, 11-13 (9th Cir. 1973), *cert. denied,* 419 U.S. 1028 (1974) and *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 474-75 (9th Cir. 1964).) However, as the opinion of the court of appeals points out, the Ninth Circuit has not completely eliminated the requirement of a showing of dangerous probability of success. Rather, it has permitted a "short-cut method" of proof, allowing in certain instances an inference to be drawn from predatory conduct of specific intent to monopolize, and in turn, an inference of dangerous probability of success to be drawn from such inferred finding of specific intent. In such instances, all a claimant need prove in the Ninth Circuit to establish a Section 2 Sherman Act attempt to monopolize claim is a requisite showing of predatory conduct (*Id.*)

Finally, it is noteworthy that *both* the rationale of attempt to monopolize advanced by petitioner, that specific intent plus an overt act is all that is necessary to make out a *prima facie* claim for attempt to monopolize, *as well as* the short-cut method accepted by the Ninth Circuit and acknowledged by the court of appeals below, have been rejected by the court of appeals for every other circuit which has confronted the issue. (See, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 508 F.2d 547 (1st Cir. 1974), *cert. denied* 421 U.S. 1004 (1975); *Kreager v. General Electric Co.,* 497 F.2d 468 (2d Cir.), *cert. denied,* 419 U.S. 861 (1974); *Sulmeyer v. Coca Cola Co.,* 515 F.2d

835 (5th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.,* 452 F.2d 579 (7th Cir. 1971), *cert. denied,* 405 U.S. 1066 (1972); *Agrashell, Inc. v. Hammons Products Co.,* 479 F.2d 269 (8th Cir.), *cert. denied,* 414 U.S. 1022 (1973); *E.J. Delaney Corp. v. Bonne Bell, Inc.,* 525 F.2d 296 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976).)

Concluding the first portion of its argument in support of its contention that this Court should grant the writ sought, petitioner argues that in any event it met the "substantial effect on competition" requirement and "also introduced evidence of defendant's 60% market share which in fact showed that the demonstrated restraints were reasonably likely to lead to monopoly".

As we have indicated above, petitioner's contentions to this Court concerning American's alleged 60% market share are misleading. The area of the market involved in which Janich claimed American had acted to attempt to monopolize was the *80° private label gin and vodka* market to retailers in California. Yet, Janich wholly failed to introduce any competent evidence showing market share of American or of any of the many other competitors in this market. The only evidence introduced by Janich reflected gross sales revenue derived from sales to retailers of *all distilled spirits, not just eighty proof (80°) gin and vodka, and not just private label.* No basis of any kind whatsoever was offered or suggested by which one could in any manner, rational or otherwise, infer from such evidence the proportionate share of the private label, gin and vodka market to retailers.

Further, as the verdict of the jury plainly showed, the petitioner did not in fact meet the "substantial effect of competition" requirement at trial, as the jury returned a

verdict in favor of American answering the following special interrogatory in the negative:

> "May the *reasonably possible* effect of such different price sales of gin and vodka have been substantially to lessen competition *or tend to create a monopoly in the sale of distilled spirits to retailer licensees* in California or to injure, destroy or prevent competition with defendant?" (Emphasis added.)

2. The Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings Calling for an Exercise of This Court's Power of Supervision.

In order to persuade the Court to grant the relief sought, petitioner has launched upon a lengthy complaint concerning what it perceives to have been its unfair treatment before the courts below. We submit petitioner's complaints are without merit.

The court of appeals painstakingly and judiciously considered all of the evidence placed before the trial court. Having done so, it handed down a carefully considered and written opinion reviewing all of petitioner's more significant arguments, in addition to which petitioner submitted a substantial number of peripheral contentions. It did not improperly "dismember" petitioner's "evidence", it merely subjected petitioner's rhetoric to reasoned analysis applying the proper standard for review.

The court carefully considered petitioner's contention that evidence of specific intent could be found from petitioner's alleged evidence of sales below cost. Such evidence showed that American had priced half gallons and pints of certain brands below overall cost because of keen competitive conditions, but that as to each brand at any time throughout the complaint period American derived a net profit from the sale of all sizes of such brand of private label gin and

vodka within the relevant market. The court thoughtfully concluded that such evidence was not sufficient without a showing that American's prices were below its *average variable cost*. Such decision was consistent with prior decisions of the Ninth Circuit. (*See, C. O. Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *see also, Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) in which the court sustained a directed verdict dismissing an attempt to monopolize claim despite the presence of evidence of overall sales below cost sufficient to allow a Robinson-Patman Act claim to go to the jury.)

The court similarly reviewed with care petitioner's contentions that specific intent to monopolize—and based thereon dangerous probability of success—could be inferred from the sale by American of its products at different prices at different geographic locations in the United States. As discussed above, the court properly concluded that an inference of specific intent to monopolize reasonably could not be based upon such conduct sufficient to support a claim for attempt to monopolize.

The court therefore found that there was no evidence from which a jury could reasonably conclude that American possessed the requisite specific intent to monopolize as required by Section 2 of the Sherman Act.

Petitioner complains that the verdict of the jury, specially finding that American's pricing practices could not possibly tend to create a monopoly or to cause injury to competition, should not bar consideration of its attempt to monopolize claim. Yet, having failed to produce competent evidence of market power, petitioner has sought to avail itself of the short-cut method of proof permitted by rulings of the Ninth Circuit that dangerous probability of success need not be shown by proof of market power where the

attempt to monopolize claim is joined with "a substantial claim of restraint of trade." The only possible claim of restraint of trade to which the attempt claim could be joined is the Robinson-Patman claim. In presenting its Robinson-Patman claim to the jury, petitioner asserted the exact same sales below cost and discriminatory pricing arguments that it has advanced on appeal and to this Court in support of its attempt to monopolize claim. The jury rejected those arguments. Therefore, while the court of appeals did not reach this issue, it is significant to note that petitioner has *not* combined its Sherman Act attempt to monopolize claim with a serious claim of restraint of trade, and using the Ninth Circuit's "short-cut" method of proof, could not establish a *prima facie* claim *even if* it had presented—which it did not—sufficient evidence of specific intent to monopolize.

We respectfully submit that none of the numerous complaints made by petitioner concerning the manner in which the court of appeals reviewed and considered the extensive evidence produced by a four-week jury trial should justify this Court in granting the writ sought.

CONCLUSION

Petitioner has been unsuccessful on four separate occasions in asserting the same, identical claims: *First,* the District Court after hearing and carefully considering the evidence before it, concluded that there being no sufficient evidence of specific intent, or dangerous probability of success, a reasonable jury could not fairly conclude that American had attempted to monopolize any portion of the market, and directed a verdict in favor of respondent; *Second*, upon having the Robinson-Patman Act claim submitted to it, based on the identical evidence upon which the petitioner now complains that the jury should have been

permitted to consider the attempt to monopolize claims, the jury specifically found that the pricing practices of American, including what petitioner here asserts to have been substantial sales below cost, could not possibly tend to create a monopoly or to injure competition; *Third,* after carefully and exhaustively considering the record the panel of the court of appeals assigned to hear the appeal reasonably found that the grounds asserted by petitioner for its alleged attempt to monopolize claim could not justify a reasonable jury in concluding in favor of the petitioner; and *Fourth* and finally, not one judge of the court of appeals responded favorably to petitioner's request for a rehearing *en banc.*

The rulings of the court below are fully consistent with prior decisions and policies of this Court. They are in complete accord with the decisions developed by the Court of Appeals for the Ninth Circuit, and to the extent they are adverse to petitioner they are consistent with decisions reached by other circuits in analogous instances. For the reasons set forth herein, we respectfully submit that the time has come that this case which was originally filed in 1967 and not brought to trial until May, 1974, should finally be put to an end. We respectfully urge that the writ of certiorari prayed for be denied.

DATED: June 28, 1978

Respectfully submitted,

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